IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN VILLANOVA and	:	**CIVIL ACTION**
LAUREN MILLER	:	
	:	
v.	:	
	:	
MICHAEL SOLOW and	:	
UPPER MORELAND TOWNSHIP	:	**NO. 97-6684**

M E M O R A N D U M

WALDMAN, J. **September 18, 1998**

Plaintiffs have asserted claims under 42 U.S.C. § 1983 for alleged violations of their constitutional rights as well as supplemental state tort claims pursuant to 28 U.S.C. § 1367(a). Presently before the court is defendant Upper Moreland Township's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint accepting the veracity of the plaintiff's allegations. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987); Nelson v. Temple University, 920 F. supp. 633, 634 n.2. (E.D. Pa. 1996). One need not, however, accept as true allegations which are merely conclusory. Perry v. Grant, 775 F. Supp. 821, 824 (M.D. Pa. 1991). A complaint may be dismissed when the facts alleged and inferences reasonably drawn therefrom are legally insufficient to support the relief sought. Pennsylvania ex rel. Zimmerman, 836 F.2d 173, 179 (3d Cir. 1988).

Plaintiffs' factual allegations are as follow.

Defendant Solow is a constable in Upper Moreland Township. He was authorized by a district justice in that Township to serve a warrant on one Victor Balin who was apparently wanted for murder. Mr. Solow went to plaintiff Villanova's apartment in the course of attempting to locate Mr. Balin. Mr. Villanova was at work at the time. His apartment was occupied by four friends including plaintiff Miller. One of the other friends opened the door when Mr. Solow knocked.

Mr. Solow identified himself as a constable. His manner was "hostile and aggressive." He said he was looking for Victor Balin who was wanted for murder and asked if anyone there knew Mr. Balin. Mr. Villanova's dog approached Mr. Solow. Mr. Solow placed a hand on his holstered gun. He "punched" and "threatened to shoot" the dog.

Although not specifically alleged, Mr. Villanova's friends apparently advised Mr. Solow that they had no information about Mr. Balin. They were told by Mr. Solow that the apartment would be surveilled by state police. He asked where he could find Mr. Villanova. The friends advised Mr. Solow that Mr. Villanova was at Abington Hospital where he worked as a parking valet.

Mr. Solow then proceeded to the hospital. He approached a valet desk attendant and a supervisor and stated

"I'm here to arrest John Villanova." Mr. Solow then parked his car and approached Mr. Villanova. Mr. Solow asked Mr. Villanova is he knew Victor Balin. Mr. Villanova said he did not. Mr. Solow told him that police would be photographing persons entering and leaving Mr. Villanova's apartment house. Mr. Villanova asked Mr. Solow why he punched the dog. Mr. Solow said he could do whatever he wanted including shooting the dog. Mr. Solow asked Mr. Villanova where his co-tenant, one Tony Tate, could be found. Mr. Villanova advised Mr. Solow how he could contact Mr. Tate and Mr. Solow departed.

Plaintiffs assert that Mr. Solow's conduct deprived them of their constitutional rights under the First, Fourth, Fifth, Sixth, Eighth, Thirteenth and Fourteenth Amendments. They refer to their "right to freedom from," inter alia, "invasion of privacy," "cruel and unusual punishment," "malicious prosecution" and "involuntary servitude."

Plaintiffs assert that the township is liable because of its "negligence" "by and through its agent, servant, workman or employee Solow." Plaintiffs also allege that the Township failed adequately to train or supervise Mr. Solow and that the district justice who authorized Mr. Solow to serve the warrant knew he "had in the past violated the rights of others and engaged in improper acts."

Both plaintiffs also assert a claim against defendant Solow for intentional infliction of emotional distress. Plaintiff Villanova asserts a claim against Mr. Solow for defamation, as well.

That there is no respondeat superior liability under § 1983. See Rizzo v. Goode, 423 U.S. 362, 370-73 (1976); Losch v. Borough of Parkesburg, Pa., 736 F.2d 903, 910 (3d Cir. 1984).

To sustain a § 1983 claim against a municipality, a plaintiff must show that a municipal official with requisite policymaking or decisionmaking authority intentionally or with deliberate indifference established or acquiesced in a practice, policy or custom which deprived plaintiff of a constitutional right. See Monell v. Department of Social Services, 436 U.S. 658, 690-91 (1978); Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3d Cir. 1994); Simmons v. City of Philadelphia, 947 F.2d 1042, 1064)(3d Cir. 1991), cert. denied 503 U.S. 985 (1992). "Congress did not intend municipalities to be held liable unless deliberate action attributable to the municipality directly caused a deprivation of federal rights." Bd. of County Com'rs. of Bryan County, Okl. v. Brown, 117 S. Ct. 1382, 1394 (1997).

The pertinent inquiry is thus whether plaintiffs adequately allege facts from which one may find that they were harmed by a constitutional violation and, if so, that the municipality itself is responsible for such violation. Mark v.

Borough of Hatboro, 51 F.3d 1137, 1149-50 (3d Cir. 1995).

The Township contends with some force that as a matter of law it is not responsible for the actions of constables. Constables are elected. See 13 Pa. C.S.A. §2. Constables "are not employees of any municipal subdivision" and "[n]o municipality is responsible for their actions." Com. v. Roose, 690 A.2d 268, 269 (Pa. Super. 1997), aff'd, 710 A.2d 1129 (Pa. 1998). They do not act under the supervisory authority of the courts. Id. They have been likened to "independent contractors," id., and must maintain their own professional liability insurance. See 42 Pa. C.S.A. § 2942(b). The training of constables is the responsibility of the state Constables' Education and Training Board. See 42 Pa. C.S.A. § 2943.

It is difficult to conclude that a municipality can make a deliberate or conscious "choice" not to train someone whose training has been entrusted by state law to others or not to supervise someone for whom the municipality has been held not to be responsible. See Canton v. Harris, 489 U.S. 378, 387 (1989); Groman v. Tp. of Manalapan, 47 F.3d 628, 637 (3d Cir. 1995). Nevertheless, a municipality arguably may be liable if a municipal official with the authority to do so engages to perform law enforcement functions a constable who is known to violate the rights of citizens he encounters in performing such functions. See Talley v. Trautman, 1997 WL 135705, *4 (E.D. Pa. Mar. 13,

1997).[1]

In any event, plaintiffs have not shown that they were harmed by conduct of defendant Solow which amounted to a constitutional violation.

Plaintiffs do not allege that they were deprived of the right to speak, associate, petition or practice religion or otherwise present any explanation of how Mr. Solow violated the First Amendment. He did not search either plaintiff's person or belongings. His brief encounters with plaintiffs and his inquiries regarding the whereabouts of a fugitive did not meaningfully interfere with plaintiffs' liberty or constitute a seizure. See Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968); Robertson v. Plano City of Texas, 70 F.3d 21, 24 (5th Cir. 1995). Plaintiffs refer to "malicious prosecution" but allege no facts from which one remotely could find they were prosecuted at all.

The Fifth Amendment does not limit the conduct of state or municipal officials. See Bartkus v. Illinois, 359 U.S. 121, 124 (1959); Bennett v. White, 865 F.2d 1395, 1406 (3d Cir. 1989); Shoemaker v. City of Lock Haven, 906 F. Supp. 230, 237-38 (M.D. Pa. 1995). The Eighth Amendment protects only convicted prisoners. See Bell v. Wolfish, 461 U.S. 520, 535 (1979);

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[1] The Township does not address the question of whether a district justice is an official for whose actions or decisions the Township itself may be liable and the court need not do so to resolve the instant motion.

Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977); Romeo v. Youngberg, 644 F.2d 147, 156 (3d Cir. 1980). Plaintiffs' allegations do not remotely show that they were enslaved or forced into involuntary servitude in violation of the Thirteenth Amendment. See U.S. v. Kozminski, 487 U.S. 931, 942 (1988); Steirer v. Bethlehem Area School Dist., 987 F.2d 989, 1000 (3d cir. 1993); Watson v. Graves, 909 F.2d 1549, 1552 (5th Cir. 1990).

Plaintiffs' allegations similarly do not state a cognizable Fourteenth Amendment claim. Verbal threats, abuse and harassment do not violate any federally protected right and are not actionable under § 1983. See Hopson v. Frederickson, 961 F.2d 1374, 1378 (8th Cir. 1992); Emmons v. McLaughlin, 874 F.2d 351, 353-54 (6th Cir. 1989); McFadden v. Lucas, 713 F.2d 143, 146 (5th Cir.), cert. denied, 464 U.S. 998 (1983); Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979); Johnson v. Glick, 481 F.2d 1028, 1033 n.7 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). There is no constitutionally protected property or liberty interest in reputation and thus an allegation of defamation at the hands of a state actor does not state a § 1983 claim. See Siegert v. Gilley, 500 U.S. 226, 233 (1991); Paul v. Davis, 424 U.S. 693, 701 (1976); Clark v. Township of Falls, 890 F.2d 611, 619 (3d Cir. 1989); DeFeo v. Sill, 810 F. Supp. 648, 656 (E.D. Pa. 1993). Plaintiffs' allegations do not remotely implicate

either the confidentiality or autonomy branches of the limited federally protected right of privacy. See Whalen v. Roe, 429 U.S. 589, 599-600 (1977); Fraternal Order of Police, Lodge No. 5 v. Westinghouse elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980); Hunter v. Securities Exchange Commission, 879 F. Supp. 494, 497-98 (E.D. Pa. 1995).[2]

If there are facts arising from the episode complained of from which a cognizable federal constitutional claim reasonably may be discerned, plaintiffs have not pled them.

It is dismaying that a lawyer would sign her name to the pleadings in this case. It should be clear from the most cursory legal research, if not basic legal knowledge, that Mr. Solow's alleged conduct did not violate seven constitutional amendments as asserted. Plaintiffs' counsel has clearly violated Fed. R. Civ. P. 11(b)(2).

Because plaintiffs have failed to state a cognizable claim for violation of their federal constitutional rights, the Township's Rule 12(b)(6) motion will be granted. Because it necessarily follows from the noted deficiencies that plaintiffs have not set forth a constitutional claim against Mr. Solow, the

[2] There is a state cause of action in Pennsylvania for tortious invasion of privacy. See Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 620-21 (3d Cir. 1992). Plaintiffs have not asserted such a state claim in their complaint and the possible availability of such a claim is immaterial to the resolution of the instant motion.

federal claims against him will be dismissed as well. See Ledford v. Sullivan, 105 F.3d 354, 356 (7th Cir. 1997) (court may dismiss as to non-moving party where inadequacy of claim is evident); Bryson v. Brand Insulations, Inc., 621 F.2d 556, 559 (3d Cir. 1980) (same); Michaels v. State of N.J., 955 F. Supp. 315, 331 (D.N.J. 1996) (dismissal of claims against non-movant appropriate when court's ruling on rule 12(b)(6) motion "applies equally" to him); Erie City Retirees Ass'n. v. City of Erie, 838 F. Supp. 1048, 1050 (W.D. Pa. 1993); Sullivan Associates, Inc. v. Dellots, Inc., 1997 WL 778976, *7 (E.D. Pa. Dec. 17, 1997). It would be pointless to now wait for defendant Solow's counsel to file an answer and Rule 12(c) motion asserting the failure to state a federal claim. See Fed. R. Civ. P. 12(h)(2).[3] Plaintiffs' state law claims will be dismissed pursuant to 28 U.S.C. § 1367(c)(3). An appropriate order will be entered.

[3] By separate motion, defendant Solow asserts that he was never properly served with process in this case. For reasons set forth in a separate memorandum order of this date, the court concludes that service was sufficient.

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MICHAEL SOLOW and	:	
UPPER MORELAND TOWNSHIP	:	**NO. 97-6684**

O R D E R

AND NOW, this day of September, 1998, upon consideration of defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. #7), consistent with the accompanying memorandum and 28 U.S.C. § 1367(c), **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and the above case is **DISMISSED**, without prejudice to plaintiffs to pursue any appropriate state law claims in state court or to plead against defendants any cognizable federal claim which may be asserted in good faith and consistent with the strictures of Fed. R. Civ. P. 11.

BY THE COURT:

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JAY C. WALDMAN, J.

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MEMORANDUM ORDER

Presently before the court is defendant Solow's Motion to Dismiss for insufficiency of service of process in this case.

Once sufficiency of service of process is challenged, the party on whose behalf service was made bears the burden of establishing the validity of service. See Bolivar v. Director of the FBI, 846 F. Supp. 163, 166 (D.P.R. 1994), aff'd, 45 F.3d 423 (1st Cir. 1995); Adams v. American Bar Assoc., 400 F. Supp. 219, 221-22 (E.D. Pa. 1975); 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1353 (1990). Factual contentions regarding the manner in which service was executed may be made through affidavits, depositions and oral testimony. See Williams v. Claims Overload Sys., Inc., 1998 WL 104476, *1 (E.D. Pa. Feb. 25, 1998); 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1353 (1990). Plaintiffs

present evidence to show the following.

Plaintiffs' attorney wrote a letter addressed to defendant Solow at his residence at 58 Church Street in Ambler, Pennsylvania informing him of plaintiffs' claims. A certified mail return receipt indicates that the letter was accepted by Angela Solow.

Plaintiffs thereafter made six unsuccessful attempts to serve defendant Solow at the Church Street address. On four occasions, there was no answer at the residence. On one occasion, defendant's daughter refused to open the door. On the final occasion, a woman identifying herself as a family friend asked the process server to "come back in a few minutes" but attempts at service over the next forty minutes were in vain.

Bernard Pender, a deputy constable and plaintiffs' process server, visited the Solow residence the following month. He saw defendant Solow and his wife through a window of the house. Mr. Pender knocked on the door and requested to speak with Michael Solow. A person identifying himself as Michael Solow came to the door. Mr. Pender asked Mr. Solow to open the door and to accept service of process. Mr. Solo refused. Mr. Pender then announced he was putting the summons and pleadings through the mail slot in the front door. He did so and left.

Defendant Solow's counsel states in his brief that he "is under the belief that Solow does not reside at 58 Church

Street, Ambler, PA." Counsel submits a photocopy of an envelope postmarked April 6, 1998 and addressed to defendant Solow at the Church Street address. The address on the envelope is crossed out and a handwritten notation says "RETURN TO SENDER -- NO LONGER @ STATED ADDRESS!" Defendant's attorney also states that although he has not conferred with his client, he believes "through conversations with an investigator who has spoken with Solow and through correspondence from Solow that Solow denies being served with the Summons and Complaint."

Statements in a brief by an attorney are no substitute for competent evidence. Similarly, markings on an envelope made by an unidentified person are not meaningful evidence of Mr. Solow's actual residence. If Mr. Solow could credibly deny that he resided at the Church Street address or challenge plaintiffs' version of events regarding service, it is inconceivable that he would not submit a sworn affidavit to that effect.

Service of process may be effected "by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." See Fed. R. Civ. P. 4(e)(2).

The evidence demonstrates that defendant Solow was personally served at his residence in Ambler by Mr. Pender.

Defendant Solow's refusal to open the door does not invalidate plaintiffs' service. Personal service need not be face to face or hand to hand. See Novack v. World Bank, 703 F.2d 1305, 1310 n.14 (D.C. Cir. 1983) ("When a person refuses to accept service, service may be effected by leaving the papers at a location, such as on a table or on the floor, near that person") (citations omitted); 4A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1095 (1987). See also Federal Fin. Co. v. Longiotti, 164 F.R.D. 419, 421-22 (E.D.N.C. 1996) (service valid where process server left envelope with summons and complaint on defendant's doorstep after his wife refused to accept service); Periodical Publishers' Serv. Bureau, Inc. v. Keys, 1992 WL 298003, *6-*7 (E.D. La. Oct. 7, 1992) (service valid where process server taped summons and complaint on apartment door after defendant's wife refused to open it).

ACCORDINGLY, this day of September, 1998, upon consideration of defendant Solow's Motion to Dismiss for insufficiency of process (Doc. #13), and plaintiffs' response thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

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JAY C. WALDMAN, J.